Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

WILLIAM L. CLAIR and JOHN D. O'MALLEY, on behalf of themselves and for all others similarly situated,

Petitioners,

v.

HARRIS TRUST AND SAVINGS BANK, THE EMPLOYEES' SAVINGS AND PROFIT SHARING PLAN OF THE BANK OF MONTREAL/HARRIS, and THE HARRIS BENEFITS ADMINISTRATIVE COMMITTEE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether, on an appeal of a district court's dismissal for want of standing, the Appellate Court, after finding standing to exist, erred, by proceeding to sua sponte (without any briefs, record or decision below) decide the ultimate issue of liability and an important ERISA issue of first impression — whether an ERISA Plan Trustee's adoption of a flat 45 day distribution policy violates typical plan language requiring distribution "within a reasonable time after his settlement date, but not later than 60 days . . ." for a federal banking institution that is already required to clear transactions within three business days — and whether the Court's sua sponte ipse dixit decision so far departs from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's supervisory power, to direct the matter be remanded to the district court for appropriate first consideration.

II. Whether, separating participants may state a claim under ERISA against an ERISA Plan Trustee who is a "T + 3" institution required to clear securities transactions within three business days may violate typical plan language requiring distribution "within a reasonable time but not more than 60 days" when it adopts a policy of delaying payouts for 45 days.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	vii
Opinions Below	1
Jurisdiction of the Supreme Court	2
Statutes Involved	2
Statement of the Case	4
Reasons for Granting the Writ	8
I. The Decision Of The Appellate Court Contradicts The Long Established Rule That A Court Of Review Does Not Consider Questions Which Were Neither Pressed Nor Passed Upon Below.	9
II. *Singleton* Makes It Clear That There Are Exceptions To The Established Principal That A Court Of Review Does Not Rule Upon Issues Not Presented Below; In This Case The Exceptions Do Not Apply.	12

Contents

Page

A. This Was Not A Case "Where The Proper Resolution Is Beyond Any Doubt". The Plaintiffs' Theory Of The Case Was Based Upon A Literal, Ordinary Language Reading Of The Statute. 13

(i) Each Plaintiff's Stake In The Litigation Is Real And Substantial. 14

B. This Case Was Not One Where "Injustice Might Otherwise Result" Or A Case Where There Are "Most Unusual Circumstances" Or Where The Question Is A Pure Question Of Law. 17

Conclusion 19

TABLE OF CITED AUTHORITIES

Page

Cases:

Anderson v. Chrysler Corp., 99 F3d 846 (7th Cir. 1996) 13

Blair v. Oesterlein Mach. Co., 275 U.S. 220, 48 S. Ct. 87 (1927) 10

Brooks v. Midas-International Corp., 47 Ill. App.3d 266, 5 Ill. Dec. 492, 361 N.E.2d 815 (1977) 14

Duigan v. United States, 274 U.S. 195 (1927) 9

Hayna v. Arby's Inc., 99 Ill. App.3d 700, 425 N.E.2d 1174 (1st Dist. 1981) 14

Hormel v. Helvering, 312 U.S. 552, 61 S. Ct. 719 (1941) 10

Lyons v. Jefferson Bank & Trust, 994 F.3d 716 (10th Cir. 1993) 12

Marrese v. Interqual, 748 F.2d 373 (7th Cir. 1984) 12

Olander v. Bucyrus-Erie Company, 187 F.3d 599 (7th Cir. 1999) 13

Cited Authorities

	Page
Panaras v. Liquid Carbonic Indust. Corp., 74 F.3d 786 (7th Cir. 1995)	13
Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357, 117 S. Ct. 855 (1997)	10
Singleton v. Wulff, 428 U.S. 106, 120 96 S. Ct. 2868 (1976)	10, 11, 12, 16, 17
Standard Mutual Ins. v. Bailey, 868 F.2d 893 (7th Cir. 1988)	13
Steinberg v. Chicago Medical School, 69 Ill.2d 320, 13 Ill. Dec. 699, 371 N.E.2d 634 (1977)	14
The Hope Clinic, et al. v. Ryan et al., __ F.3d __, 1999 WL 974098 (7th Cir. 1999)	9
Trierweiler v. Croxton and Trench Holding Corp., 90 F.3d 1523 (10th Cir. 1996)	11, 12
Statutes:	
26 U.S.C.A. § 401(a)(14)	3
28 U.S.C. § 1254(1)	2
29 U.S.C. § 1132	2
12 C.F.R. § 12.9	3, 18

Cited Authorities

Page

Other Authoritiy:

Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 Ariz. L. Rev. 923 (Fall 1998) 16

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Dated And Decided August 10, 1999 ..... 1a

Appendix B — Judgment Of The United States Court Of Appeals For The Seventh Circuit Dated August 10, 1999 ..... 10a

Appendix C — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Illinois, Eastern Division Dated April 27, 1998 ..... 12a

Appendix D — Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petition For Rehearing Dated September 10, 1999 ..... 20a

The petitioners, William L. Clair and John D. O'Malley, respectfully pray, that a writ of certiorari issues to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered August 10, 1999, in the above titled proceeding.

Because the error of the decision below is based upon well settled and stable law, the facts and posture of this case are not in dispute, and the Appellate Court's decision is clearly in error, the Petitioner therefore, respectfully requests a summary reversal with an order for remand to the District Court for further proceedings on the merits issue of whether the Banks 45 day payment policy violates the ERISA plan's requirement of "within a reasonable time after his settlement date, but not later than 60 days . . ." App. A, 2a.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, on which the petitioners pray for certiorari, is reported at 190 F.3d 495 and is reprinted in the appendix hereto at App. A, 1a.

The opinion and order of the United States District Court of the Northern District of Illinois, Eastern District (Anderson, J.) granting and entering judgment for defendant on their motion to dismiss for a lack of standing is unreported, but can be found at 1998 WL 246492 (N.D. Ill) and is also reprinted in the appendix hereto at App. C, 12a.

JURISDICTION OF THE SUPREME COURT

The Opinion of the Seventh Circuit Court of Appeals was entered August 19, 1999. A petition for rehearing petition for rehearing *en banc* was filed on August 24, 1999, and was denied on September 10, 1999. App. D, 20a.

Jurisdiction of this Court to review the Judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

ERISA § 502, 29 U.S.C. § 1132 Civil Enforcement.

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * *

12 C.F.R. § 12.9 Settlement of securities transactions.

(a) A national bank shall not effect or enter into a contract for the purchase or sale of a security (other than an exempted security as defined in 15 U.S.C. 78c(a)(12), government security, municipal security, commercial paper, bankers' acceptances, or commercial bills) that provides for payment of funds and delivery of securities later than the third business day after the date of the contract, unless otherwise expressly agreed to by the parties at the time of the transaction.

* * *

26 U.S.C.A. § 401(a)(14)

(14) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that, unless the participant otherwise elects, the payment of benefits under the plan to the participant will begin not later than the 60th day after the latest of the close of the plan year in which —

(A) the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(B) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(C) the participant terminates his service with the employer.

* * *

STATEMENT OF THE CASE

The Trial Court Decision and the Lack of a Record Developed Below. This case was filed under ERISA asserting that the Plan Trustee's policy of not paying out benefits before 45 days violated the Plan's requirement that benefits be paid out to terminated employees "within a reasonable time after settlement, but not later than 60 days . . ." where the Trustee is an institution already required to clear its securities transactions within three business days. App. A, 2a and App. C, 13-14a. On November 19, 1997, the District Court granted Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint, holding that redeemed are no longer "participants" so lacked standing under ERISA to bring the claim. App. A, 3a, 9a, and App. C, 17a, 18a. Necessarily, the issue on the merits was not reached by the District Court. App. A, 3a, 9a, and App. C, 17a. No discovery was conducted.

The Appellate Court Decision. On August, 10, 1999, the U.S. Appellate Court for the Seventh Circuit, disagreed

(finding the former participants do have standing) but affirmed the dismissal, in its view that Plaintiffs' have a case on an "ordinary language" reading of the plan provisions. App. A, 7-8a.

The Appellate Court's decision on the ultimate issue of liability was without a trial court record because the issue of the Plan's language had not been briefed or debated below. Indeed, the Court of Appeals acknowledged that, "[t]he defendants have not asked us to reach the merits if we disagree (as we do) with their stubborn defense of the district court's erroneous jurisdictional rulings." But the Appellate Court then sua sponte determined that "no purpose would be served by remanding the case to enable that court to have a pass at the merits", calling "[t]he plaintiffs' position on the merits border[ing] on the frivolous" because it would mean the Plan drafters intended to invite ERISA litigation on the "reasonableness" of the Plan's Trustees action, and thus, the Appellate Court modified the district court's order to place the "decision on the merits of the plaintiffs' suit rather than on the ground that they had no standing to sue." App. A, 7-9a.

The Facts of the Case, the Issue of Standing. Harris, the defendant bank, is trustee under its retirement plan, which is invested solely in public securities. App. A, 2a, App. C, 13a. Upon retirement, the employee is entitled to receive the current market value of his or her account as of the "settlement date". App. A, 2a, App. C, 13-14a.

The plan requires that the trustee pay those to a separating employee "within a reasonable time after his settlement date, but not later than 60 days after (a) the end of the plan year in which his settlement date occurs, or (b) . . . [not applicable here]." App. A, 2a, App. C, 13-14a.

The bank adopted a policy of paying benefits 45 days after the applicable date. The plaintiffs' complain that this is unreasonably long because the bank — as a "T + 3" institution,[1] is required to clear its securities transactions within 3 days and so can reasonably pay benefits in much less than 45 days. App. A, 2a, 8a.

Because Plaintiffs' benefits were not paid within a reasonable time (the issue of fact is open, as it was unlitigated and not decided), the Plaintiffs' seek the lost earnings interest or time value of their money. App. A, 4a. Plaintiffs' sought the equitable relief of imposing a constructive trust (among other alleged equitable awards) for the interest the Bank earned, which is rightfully theirs for the time period, somewhere after 3 days and before the running of "within a reasonable time" after the settlement date. App. A, 6-7a.

The Seventh Circuit proceeded through the applicable ERISA cause of action provisions, and held that the plaintiffs' constructive trust theory of relief is "squarely within the scope of section 502(a)(3)(B) . . . [and] [s]o the plaintiffs are entitled to maintain this suit after all." App. A, 7a.

The Appellate Court Reached and Resolved Ultimate Issue by Modifying the District Courts Order. But then, the Appellate Court addressed the merits, whether the phrase " 'within a reasonable time' not to exceed 60 days entitles the plaintiffs to litigate the issue whether the defendants could have paid the benefits due the plaintiffs within a shorter period, perhaps as little as 3 days." App. A, 8a. The Court stated:

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1. "T+3" refers to 12 C.F.R. § 12.9, which requires national banks to settle securities transactions within three business days following the transaction.

> As a matter of ordinary language, the plaintiffs have a case. Read literally, the plan grants participants two entitlements: payment within 60 days, no matter how difficult it is for the plan to comply with this deadline (provided only that the amount due the participant as of the settlement date can be calculated then); and payment within the shortest period in which payment would be reasonable. . . .
>
> The literal reading of the plan provision would be absurd, however. It would mean that the authors of the plan had invited participants (more realistically, in view of the rather small stakes for any individual employee, class action lawyers) to litigate over how soon within the 60-day period the employer could "reasonably" be required to pay. A searching inquiry into the actual and feasible accounting practices of the plan, into the cost and configuration of alternative software packages for calculating benefits, and into alternative methods electronic and otherwise of transferring funds to participants in the least amount of time would be incited. Although in some settings "within a reasonable time" can be given a pretty definite meaning through the methods of litigation, *e.g.*, *Savasta v. 470 Newport Associates*, 82 N.Y.2d 763, 603 N.Y.S.2d 821, 623 N.E.2d 1171 (1993) (per curiam); *Chemtrol Adhesives, Inc. v. American Mfrs. Mutual Ins. Co.*, 42 Ohio St.3d 40, 537 N.E.2d 624, 636 (1989); *Kaplan v. Shure Bros., Inc.*, 153 F.3d 413, 423 (7th Cir.1998); *In re D.L.*, 299 Ill. App.3d 269, 233 Ill. Dec. 689, 701 N.E.2d 539, 541-42 (1998),

> this is not one of them. The only long-run effect of the interpretation for which the plaintiffs are contending would be deletion of "within a reasonable time" from, and the fixing of 60 days (the maximum allowed by the Internal Revenue Service for pension plans of this sort, 26 U.S.C. § 401(a)(14); Treas. Reg. s 1.401(a)-(14)(a)) as the only deadline in, all ERISA retirement plans. No one would benefit from such a change. It is apparent that what the authors of the plan meant was that the plan reserved the right to wait the full 60 days allowed by the IRS to make the payment. There is no suggestion that anyone was fooled by the reference to reasonableness. App. A, 8-9a.

The Plaintiffs' sought rehearing, in part by showing that the impact on a participant is actually quite substantial, amounting to approximately $3,100 and $4,100 for these Plaintiffs alone. Nonetheless, rehearing was denied on September 10, 1999. App. D, 20a.

REASONS FOR GRANTING THE WRIT

The Appellate Court's rendering of a gratuitous sua sponte ipse dixit ruling on a first impression evaluation of an important ERISA plan interpretation issue effectively eliminating the proper litigation role of evaluating such issues, usurped the litigation and drafting role of Congress and the Plan's drafters, and writes reasonableness out of existence for similar plans nationwide.

In ruling upon the case's ultimate issue without a record or brief on the merits below, the Appellate Court has "tak[en]

a leap into the unknown without any input from the parties." *The Hope Clinic, et al. v. Ryan et al.*, __ F.3d __, 1999 WL 974098,*18 (7th Cir. 1999) (J. Posner, Dissenting). The fundamental purpose of litigation is to find facts, test issues and arguments in the crucible of advocacy, supported by the rules of procedure. In this case the usual course of litigation was suspended and the separation of litigation and lawlessness crept towards one another. Indeed the concept of "reasonableness" is one peculiarly suited to Trial Court evaluation in context. The Court's job is to interpret the term reasonableness under ERISA, not just read it out of the Plan.

For this reason the Seventh Circuit's decision departed from the accepted and usual course of judicial proceeding as to call for the exercise of this Court's supervisory power to summarily grant certiorari, vacate the affirmance, and remand to the district court to interpret the Plan language, which is contained in most ERISA plans nationwide.

I. THE DECISION OF THE APPELLATE COURT CONTRADICTS THE LONG ESTABLISHED RULE THAT A COURT OF REVIEW DOES NOT CONSIDER QUESTIONS WHICH WERE NEITHER PRESSED NOR PASSED UPON BELOW.

The Court's job is to interpret language with the parties involvement, not rewrite the Plan with its own view. One fundamental axiom of appellate review is the established prohibition against ruling upon issues not passed upon below. *Duigan v. United States*, 274 U.S. 195, 200 (1927) ("This court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not

pressed or passed upon below are reviewed.") (Multiple Citations Omitted); *see also Blair v. Oesterlein Mach. Co.*, 275 U.S. 220, 225, 48 S. Ct. 87 (1927) (An issues not raised, considered, or upon the record below is not properly before the Supreme Court as a court that sits in review.)

This old rule remains good law through modernity and is applied to Appellate Court review as well. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 399, 117 S. Ct. 855, 877 (1997) (Breyer, Concurring in part and dissenting in part). In *Singleton v. Wulff*, 428 U.S. 106, 120 96 S. Ct. 2868, 2877 (1976), the Supreme Court stated that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."

The rationale is clear.

> [O]ur procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Hormel v. Helvering, 312 U.S. 552, 556, 61 S. Ct. 719, 721 (1941).

In *Singleton*, the court held, that a litigant who did not present an answer to a complaint could expect and was

"justified in not presenting" arguments to the Court on Appeal because he would "at least be allowed to answer the complaint should the Court of Appeals reinstate it." *Singleton*, 428 U.S. at 121, 96 S. Ct. at 2877. *Cf. Trierweiler v. Croxton and Trench Holding Corp.*, 90 F.3d 1523 (10th Cir. 1996).

The facts in *Singleton*, are strikingly analogous to the situation in this case. There, the appellate court resolved the merits of a case which had been dismissed by the district court for a lack of standing on a motion to dismiss. That is this case. In *Singleton*, the district court was never presented with the merits issue that the appellate court reached and resolved. In both *Singleton* and this case, the district court only had a "pre-answer motion to dismiss for a lack of standing. He filed no answer, and no other pleading addressed the merits." *Singleton*, 428 U.S. at 120, 96 S. Ct. at 2877. In *Singleton*, some interrogatories were answered, but that is not even the case presented by the petitioner here. *Singleton*, 428 U.S. at 120, 96 S. Ct. at 2877.

The rationale supporting the holding in *Singleton* is applicable in this case. The plaintiff has not had the "opportunity to offer all the evidence they believe relevant to the issues." Further, based upon the Seventh Circuit's reaching and resolving the ultimate issue without a developed record the plaintiffs are "surprised on appeal by final decision . . . of issues upon which they have had no opportunity to introduce evidence." And finally, plaintiffs were "justified in not presenting" arguments regarding the ultimate issue of liability to the Court on Appeal because they would able to address that "should the Court of Appeals reinstate it." *Singleton*, 428 U.S. at 121, 96 S. Ct. at 2877.

II. *SINGLETON* MAKES IT CLEAR THAT THERE ARE EXCEPTIONS TO THE ESTABLISHED PRINCIPAL THAT A COURT OF REVIEW DOES NOT RULE UPON ISSUES NOT PRESENTED BELOW; IN THIS CASE THE EXCEPTIONS DO NOT APPLY.

Singleton stated the exceptions under which questions may be taken up and resolved for the first time on appeal. The Appellate Court has discretion, exercised upon the facts of individual cases, "where the proper resolution is beyond any doubt" or where "injustice might otherwise result." *Singleton*, 428 U.S. at 121, 96 S. Ct. at 2877. *E.g. Lyons v. Jefferson Bank & Trust*, 994 F.3d 716, 720 (10th Cir. 1993) ("we have exercised our discretion to hear issues for the first time on appeal only in the most unusual circumstances."); *Trierweiler*, 90 F.3d at 1538 (appropriate to reach question not addressed below where the issue was "purely legal question: whether [statute] is substantive or procedural for *Erie* purposes."); *Marrese v. Interqual*, 748 F.2d 373, 384-5 (7th Cir. 1984) (Court was justified in resolving issue not passed on below "[i]n light of this comprehensive statutory scheme" and "fact that the state action doctrine exempts conduct that is 'clearly articulated and affirmatively expressed as state policy' " and "actively supervised" by the State from the Federal antitrust laws).

In this case the application of the exception to the rule was not reached and was not considered by the Seventh Circuit.

A. This Was Not A Case "Where The Proper Resolution Is Beyond Any Doubt". The Plaintiffs' Theory Of The Case Was Based Upon A Literal, Ordinary Language Reading Of The Statute.

The Seventh Circuit gratuitously and inappropriately characterized the Plaintiffs' claim as "border[ing] on frivolous". However, a literal or ordinary reading of a statutory provision simply cannot be frivolous. That is after all the rule of interpretation in this and most other circumstances[2]. Plaintiffs should be able to rely on the plain meaning of a provision drafted by the Defendant. *Standard Mutual Ins. v. Bailey*, 868 F.2d 893, 900-901 (7th Cir. 1988) (The Court would not strain to read an insurance contract provision saying, "this court 'cannot ignore the plain wording' . . . we will not rewrite insurance contracts in order to extend greater coverage than that to which the parties agreed because . . . '[e]ven an insurance company, after all, is entitled to rely on the contracts it signs.' ") (Citations omitted). A claim is frivolous and falls below the "low threshold" of a "colorable claim" requirement only where the legal theory asserted is "so bizarre or so out of line with existing precedent". *Panaras v. Liquid Carbonic Indust. Corp.*, 74 F.3d 786, 790 (7th Cir. 1995). The Appellate Court's opinion in this case conceded that the plaintiffs literal reading of the statute the plaintiffs position had merit, plaintiffs' position could not be frivolous and thus not one where the resolution is not beyond any doubt.

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2. *See Olander v. Bucyrus-Erie Company*, 187 F.3d 599, 604 (7th Cir. 1999) and *Anderson v. Chrysler Corp.*, 99 F3d 846, 857 (7th Cir. 1996) (interpretation of employee benefit plan term "in ordinary and popular sense as would person of average intelligence and experience.")

(i) *Each Plaintiff's Stake In The Litigation Is Real And Substantial.*

The Court attacked the Plaintiffs' position as *de minimus* and as a mere boon to "class action lawyers." However, the purpose of the Plaintiffs' case was to provide full value and prevent a windfall to the Defendant in the form of an interest free loan.

The Court's attack on class action attorneys is unsupportable. A class action is the only effective way of addressing and redressing the challenge to standard practices such as those here. "The inherent advantages of class action suits are to vindicate the rights of numerous claimants in one action where the individual claims might be impractical." *Hayna v. Arby's Inc.*, 99 Ill. App.3d 700, 712, 425 N.E.2d 1174 (1st Dist. 1981). (The advantages of class action suits are to vindicate the rights of numerous claimants in one action where the individual claims might be impractical. *Citing Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 13 Ill. Dec. 699, 371 N.E.2d 634 (1977); *Brooks v. Midas-International Corp.*, 47 Ill. App.3d 266, 5 Ill. Dec. 492, 361 N.E.2d 815 (1977).

A question of class certification is different than a question of the merits. "[I]nsubstantial recoveries by class members, high administrative costs in relation to aggregate recovery and difficulty in corroborating claims are valid considerations in determining whether a class action is manageable." *Hyana*, 99 Ill. App.3d at 712, 425 N.E.2d at 1184.

Here, there are a large number of replicated claims, and individual actions against Harris would be impracticable. The

cost and expense of individual actions when weighed against the individual recoveries obtainable, would be prohibitive. Such individual litigation would be uneconomical and is disproportionately expensive.

The Appellate Court's opinion, was without a factual or legal foundation, prejudicially labels the individual recovery of the plaintiffs "absurd" and "small stakes" with the implication that this litigation is driven solely by the invitation of class action lawyers. App. A, 8a.

However, in Plaintiffs' petition for rehearing, we presented the following, showing that the individual stakes are demonstrable and substantial. For example: Mr. Clair's distribution amount was $281,716.44. Mr. O'Malley's distribution about was $362,149.50. Based on the Prime Rate during June and July of 1995, which was 9.00%, and 8.75% in August, the amounts at issue would be about 1.1% ($3,169 for Clair, $4,074 for O'Malley, plenty for any one retiree to be upset about). Similarly, the S&P 500's increase during the relevant time period of June 30, 1995 to August 15, 1995 from 544.75 to 558.11 is a 2.45% increase. Similarly, the Dow Jones Industrial's increase for the same period from 4556.1 to 4640.8 represents 1.8%. Regardless of what the actual performance of the money was during they delay period, and whether measured by a relevant interest rate (as use value compensation) or a stock market investment rate (being the earnings made on the separated person's money during the delay period), there is still work to be done before anyone can reasonably conclude that the case is either *de minimus* or one that "borders on the frivolous". One who presumes that retirees have no legitimate interest in protecting against someone else "filching" 1% of a retiree's retirement assets should consider speaking with some

directly. The computation of the interest or value of this "float" period is substantial to an individual, without regard to the potential windfall to an errant trustee who might or might not be using the float to supplement its fees.

Following class certification, a finding that an arbitrary 45 day delay violates the Plan would amount to a recovery quite substantial. Thousands of dollars is a real stake to the people who are members of the proposed class.

This class action is not one where a plaintiff class recovery is in essence reduced to a marketing program for the alleged defrauder. Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 Ariz. L. Rev. 923 (Fall 1998).

The district court and the appellate court did not have a factual record on the issue of the equitable recovery sought in this case.

No evidence regarding the defendants reason for the 45 delay was developed.

No evidence regarding if payments could have been made more quickly was developed.

No evidence regarding if or how the defendant used these funds during the delay period was made.

Neither the recovery to the named plaintiffs was not calculated, nor was recovery to the class investigated.

The above evidence was not developed because the jurisdictional dispute mooted these discovery avenues and are justified under *Singleton*, 428 U.S. at 121, 96 S. Ct. at

2877 (litigant was "justified in not presenting" arguments to the appellate court on review of standing from motion to dismiss because he would expect that on success regarding the standing issue the appellate court would "reinstate" the claim in the district court).

In short, conclusive judicial presumptions not resting on an evidentiary record, are no less unfair prejudice than when an average uniformed juror has made up his mind without requiring trial evidence.

B. This Case Was Not One Where "Injustice Might Otherwise Result" Or A Case Where There Are "Most Unusual Circumstances" Or Where The Question Is A Pure Question Of Law.

The Appellate decision is silent on the issue of whether "injustice might otherwise result" or whether there were "most unusual circumstances" and rejected the notion that this was a pure question of law.

There was no debate or statement in this case that a decision against the Defendant for remand to the District Court would have caused any injustice. Any injustice in this case falls upon the plaintiff for the Appellate Court's *sua sponte* ruling on the ultimate merits issue. Harris Bank was not in jeopardy of closing, or over burdened by the litigation; — rather if liability is found against Harris, the putative Class benefits by recovering the money to which they are entitled and ending the windfall to the Defendant from the free use of the Plaintiffs' money in the float period.

The Appellate court indicated that the question of "within a reasonable time" was a question of fact, determinable by an "inquiry into the actual and feasible accounting practice of the plan." App. A, 8-9a.

Finally, although the Appellate Court certainly has some discretion regarding *new* issues raised for the first time on appeal, an issue not presented to the lower court at all, should be remanded if any factual development is needed to prevent injustice. The plaintiffs' case clearly meets that standard. Here, the complaint was that, for a "T+3" institution, holding purely publicly traded shares, it was unreasonable to delay payments for an entire forty-five (45) day period without paying interest and earnings on plaintiffs' money during the delay. Because the District Court dismissed Plaintiffs' on solely the jurisdictional basis, both the recovery for the plaintiffs and the class was not calculated or argued, and a determination of a reasonable time was not addressed *at all*. Thus, the Appellate Court's decision that leaving in a "reasonable" time provision is not frivolous and the potential recovery (addressed as small stakes) was pure *sua sponte* ipse dixit.

CONCLUSION

This case demonstrates the Court's need to exercise its supervisory power, to correct a gross error that departs from the accepted and usual course of judicial proceedings. In this case, where the appeal was from the district court's dismissal for want of standing, the Appellate Court proceeded to *sua sponte* decide the ultimate issue of liability. Without a record or brief, the Appellate Court held that an ERISA Plan Trustee's adoption of a flat 45 day distribution policy does not violate typical plan language requiring distribution "within a reasonable time after his settlement date, but not later than 60 days . . ." for a federal banking institution that is already required to clear transactions within three business days. Because most other ERISA plans contain such language, the issue is of major import and should be evaluated after full briefing and argument on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AND DECIDED AUGUST 10, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2334

William L. CLAIR and John D. O'Malley, for themselves and for all others similarly situated,

Plaintiffs-Appellants,

v.

HARRIS TRUST AND SAVINGS BANK, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 7311 — Wayne R. Andersen, *Judge.*

ARGUED JANUARY 15, 1999 —
DECIDED AUGUST 10, 1999

Before POSNER, *Chief Judge*, and KANNE and EVANS, *Circuit Judges.*

POSNER, *Chief Judge.* This is a class action suit under ERISA complaining about delay in the payment of benefits to which the members of the class were entitled by their employer's retirement plan. The defendant bank has a

defined-contribution retirement plan. The contributions that the employer and the employee make are deposited in an individual account of the employee and he decides how to invest it. When he retires he receives the current market value of the investments in his account as of the last day of the quarter preceding his retirement. That day is the "settlement date," and the plan provides that the benefits will be paid to the employee "within a reasonable time after his settlement date, but not later than 60 days after (a) the end of the plan year in which his settlement date occurs, or (b) such later date on which the amount of the payment can be ascertained by the committee [that administers the plan]." The settlement date is the end of the plan year for a retiring employee, and so, with the exception of the qualification in (b), the plan entitles the employee to receive his benefits within a reasonable time after the settlement date that is not to exceed 60 days.

The bank's practice is to pay the benefits 45 days after the settlement date and the plaintiffs complain that this is unreasonably long — that the bank could easily pay within 3 days. They point out that the plan does not say that the benefits will be paid 45 days, or no more than 60 days, after the settlement date; it says they must be paid within a "reasonable time" — 45 days is nowhere mentioned in the plan itself and 60 days is just the outer limit. If payment is made after 60 days, the plan cannot defend on the ground that it was reasonable to take longer, unless it can squeeze itself into the exception in (b) for cases in which for some reason it is impossible to determine the value of the employee's share of the plan on the settlement date, and this is not claimed to be the situation here.

Appendix A

The district court dismissed the suit on the basis of the defendants' argument that the plaintiffs lack standing to complain under ERISA about this alleged violation of the plan because, when they received the full balance in their retirement accounts as determined on the settlement date — which they did, albeit 45 days after that date — they ceased to be participants in the plan. ERISA permits only "a participant or beneficiary . . . to recover benefits due to him under the terms of his plan," ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and only a "participant, beneficiary, or fiduciary" to obtain (so far as relevant to this case) "appropriate equitable relief . . . to redress . . . violations [of] the terms of the plan." § 502(a)(3)(B)(i), 29 U.S.C. § 1132(a)(3)(B)(i).

The term "participant" has been interpreted to include former employees "who have 'a colorable claim' to vested benefits." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117-18, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989); *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 978-79 (7th Cir.1999); *Panaras v. Liquid Carbonic Industries Corp.*, 74 F.3d 786, 789-91 (7th Cir.1996). These cases involved section 502(a)(1)(B), but we cannot think of any reason why "participant" or "beneficiary" would be defined differently under (3)(B) or why, if the plan had cashed the plaintiffs out at a smaller benefit than they were due under the plan, they could not have sued as plan beneficiaries as well as participants (several cases assume they could have, *Mers v. Marriott Int'l Group Accidental Death & Dismemberment Plan*, 144 F.3d 1014, 1018 (7th Cir.1998); *Fotta v. Trustees*, 165 F.3d 209 (3d Cir.1998); *Turner v. Fallon Community Health Plan, Inc.*, 127 F.3d 196 (1st Cir.1997)), since the

plan designated them as the beneficiaries. We cannot see, incidentally, what difference it makes under which classification they sue. *Matassarin v. Lynch*, 174 F.3d 549, 566 (5th Cir.1999), and *Smith v. Provident Bank*, 170 F.3d 609, 616 (6th Cir.1999), assume there is none.

These plaintiffs, however (and the rest of the class, which consists of similarly situated employees of the bank), do not seek unpaid benefits. Their complaint is that their benefits were not paid in a timely fashion and as a result they lost the time value of the money. They want the interest they could have earned had they been paid the money in a timely fashion and invested it, but interest is not a benefit specified anywhere in the plan, and only benefits specified in the plan can be recovered in a suit under section 502(a)(1)(B). E.g., *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 144-47, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985); *Harsch v. Eisenberg*, 956 F.2d 651, 654-56 (7th Cir.1992); *Turner v. Fallon Community Health Plan, Inc.*, supra, 127 F.3d at 198-200. Their argument that benefits include interest on benefits when the benefits are paid late is inconsistent with the principle that benefits payable under an ERISA plan are limited to the benefits specified in the plan. E.g., *Massachusetts Mutual Life Ins. Co. v. Russell*, supra, 473 U.S. at 148, 105 S.Ct. 3085; *Pohl v. National Benefits Consultants, Inc.*, 956 F.2d 126, 128 (7th Cir.1992); *Hein v. FDIC*, 88 F.3d 210, 215 (3d Cir.1996). The plan freezes the amount of benefits as of the settlement date and makes no provision for interest on that amount however long the payment of the benefits is delayed.

The plaintiffs also sued under section 502(a)(3)(B), however, which authorizes suits to redress plan violations, as distinct from suits to recover unpaid benefits. In failing to give any weight to the difference between the language of the two sections, the district court may have been misled by the passage we quoted earlier from Firestone — that the "participants" (and, we have added, the "beneficiaries") entitled to sue under ERISA's enforcement provisions include former employees "who have 'a colorable claim' to vested benefits." The Court was talking about who may bring a suit for benefits, not whether someone who would be entitled to bring such a suit if he were seeking that relief could sue for other relief, which section 502(a)(3)(B) plainly shows he could. See *Varity Corp. v. Howe*, 516 U.S. 489, 515, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996); *Fotta v. Trustees*, supra, 165 F.3d at 213-14. The district court may also have been misled by the principle that ERISA does not entitle a plan participant or beneficiary to seek damages (other than unpaid benefits) for a violation of the terms of the plan, *Massachusetts Mutual Life Ins. Co. v. Russell*, supra, 473 U.S. at 144-47, 105 S.Ct. 3085; *Harsch v. Eisenberg*, supra, 956 F.2d at 654-60; *Turner v. Fallon Community Health Plan, Inc.*, supra, 127 F.3d at 198-200, and the plaintiffs here are seeking money. But not all monetary relief is damages. Equity sometimes awards monetary relief, or the equivalent, and restitution is both a legal and an equitable remedy that is monetary yet is distinct from damages. More on this shortly. The defendants' position would have the odd implication that if the settlement date were June 30, 1990, and the bank did not cut a check to the retiring employee until July 1, 1991, the employee would have no redress, since he would have received his full plan

benefits, albeit ten months after the last date on which he was entitled to receive them under the terms of the plan. The violation of the plan would be plain, but there would be no remedy. Yet if, realizing that this was his employer's policy, the employee had sought an injunction against it before he retired — that is, at a time when he was indisputably a participant and beneficiary — he would have been entitled to relief by the second statutory provision that we quoted, section 502(a)(3)(B), or possibly by the first, (1)(B) (see *Massachusetts Mutual Life Ins. Co. v. Russell*, supra, 473 U.S. at 147, 105 S.Ct. 3085), instead (see *Varity Corp. v. Howe*, supra, 516 U.S. at 515, 116 S.Ct. 1065) or as well, even though (1)(B) does not refer to equitable relief. If, however, the policy was new or was somehow concealed, injunctive relief, though authorized, would be infeasible, leaving (if the defendants' jurisdictional argument is correct) a big gap in ERISA's remedial scheme, which ERISA's very broad preemption provision, 29 U.S.C. § 1144; *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1487-90 (7th Cir.1996), would probably prevent state law from filling.

ERISA confines the right to relief to participants, beneficiaries, and fiduciaries because they are the classes of person that ERISA is concerned about. The plaintiffs here claim to have been stiffed in their capacity as participants, and since former employees retain participant status, these plaintiffs are within the scope of section 502 — but only if they are seeking equitable relief, since the only nonequitable relief authorized by section 502 is a suit for unpaid benefits and we have seen that this suit cannot be so characterized. The plaintiffs argue that they are seeking restitution of the wrongful gain that the plan obtained by having the interest-

free use of money rightfully theirs under the terms of the plan, and that restitution is an equitable remedy. It is not; as explained in another case decided today, it is a legal remedy when sought in a case at law (for example, a suit for breach of contract) and an equitable remedy when sought in an equity case. *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 710 (7th Cir.1999). As we also explain in Health Cost Controls, however, restitution is equitable when sought by a person complaining of a breach of trust, as these plaintiffs are.

What is more, the plaintiffs are asking in the alternative that the court impress a constructive trust on the interest that the defendants earned on benefits withheld in violation of the terms of the plan. A constructive trust, as we point out in Health Cost Controls, is an equitable remedy commonly sought and granted in cases of unjust enrichment. It operates much like restitution — indeed it is sometimes referred to as a restitutionary remedy, 1 Dobbs, supra, § 4.3, p. 587 — but it is securely equitable because it is never a legal remedy. If A wrongfully appropriates money or other property belonging to B, the court can order A to hold the property in trust for B. That is the nature of the relief sought by the plaintiffs in this case. Health Cost Controls holds that such relief is squarely within the scope of section 502(a)(3)(B).

So the plaintiffs are entitled to maintain this suit after all.

The question on the merits is whether the phrase "within a reasonable time" not to exceed 60 days entitles the plaintiffs to litigate the issue whether the defendants could have paid

the benefits due the plaintiffs within a shorter period, perhaps as little as 3 days. As a matter of ordinary language, the plaintiffs have a case. Read literally, the plan grants participants two entitlements: payment within 60 days, no matter how difficult it is for the plan to comply with this deadline (provided only that the amount due the participant as of the settlement date can be calculated then); and payment within the shortest period in which payment would be reasonable. The summary plan description eliminates the second entitlement; but when plan and summary plan description are inconsistent, it is the former that controls unless the employee has relied on the latter. *Health Cost Controls of Illinois, Inc. v. Washington*, supra, at 711-12.

The literal reading of the plan provision would be absurd, however. It would mean that the authors of the plan had invited participants (more realistically, in view of the rather small stakes for any individual employee, class action lawyers) to litigate over how soon within the 60-day period the employer could "reasonably" be required to pay. A searching inquiry into the actual and feasible accounting practices of the plan, into the cost and configuration of alternative software packages for calculating benefits, and into alternative methods electronic and otherwise of transferring funds to participants in the least amount of time would be incited. Although in some settings "within a reasonable time" can be given a pretty definite meaning through the methods of litigation, e.g., *Savasta v. 470 Newport Associates*, 82 N.Y.2d 763, 603 N.Y.S.2d 821, 623 N.E.2d 1171 (1993) (per curiam); *Chemtrol Adhesives, Inc. v. American Mfrs. Mutual Ins. Co.*, 42 Ohio St.3d 40, 537 N.E.2d 624, 636 (1989); *Kaplan v. Shure Bros., Inc.*, 153

F.3d 413, 423 (7th Cir.1998); *In re D.L.*, 299 Ill.App.3d 269, 233 Ill.Dec. 689, 701 N.E.2d 539, 541-42 (1998), this is not one of them. The only long-run effect of the interpretation for which the plaintiffs are contending would be deletion of "within a reasonable time" from, and the fixing of 60 days (the maximum allowed by the Internal Revenue Service for pension plans of this sort, 26 U.S.C. § 401(a)(14); Treas. Reg. § 1.401(a)-(14)(a)) as the only deadline in, all ERISA retirement plans. No one would benefit from such a change. It is apparent that what the authors of the plan meant was that the plan reserved the right to wait the full 60 days allowed by the IRS to make the payment. There is no suggestion that anyone was fooled by the reference to reasonableness.

The defendants have not asked us to reach the merits if we disagree (as we do) with their stubborn defense of the district court's erroneous jurisdictional rulings. But as in *Anweiler v. American Electric Power Service Corp.*, 3 F.3d 986, 993 (7th Cir.1993), no purpose would be served by remanding the case to enable that court to have a pass at the merits. The plaintiffs' position on the merits borders on the frivolous. The district judge was therefore right to dismiss the suit but we modify his order to place decision on the merits of the plaintiffs' suit rather than on the ground that they had no standing to sue.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED AUGUST 10, 1999

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGEMENT — WITH ORAL ARGUMENT

Date: August 10, 1999

BEFORE: Hon. RICHARD A POSNER, Chief Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

No. 98-2334

WILLIAM L. CLAIR and JOHN D. O'MALLEY, for themselves and for all others similarly situated,

Plaintiff-Appellant,

v.

HARRIS TRUST AND SAVINGS BANK, EMPLOYEES' SAVINGS AND PROFIT SHARING PLAN OF BANK OF MONTREAL/HARRIS, AND HARRIS BENEFITS ADMINISTRATIVE COMMITTEE,

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 96 C 7311 — Wayne R. Andersen, Judge

Appendix B

The judgement of the District Court is AFFIRMED and MODIFIED, with costs. The district judge was right to dismiss the suit but we modify his order to place decision on the merits of the plaintiffs' suit rather than on the ground that they had no standing to sue. The above is in accordance with the decision of this court entered on this date.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED APRIL 27, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 96 C 7311
Judge Wayne R. Andersen

William L. CLAIR and John D. O'Malley for themselves and for all others similarly situated,

Plaintiffs,

v.

Harris Trust and Savings Bank, the Employees' Savings and Profit Sharing Plan of Bank of Montreal/Harris, and the Harris Benefits Administration Committee,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs William Clair and John O'Malley filed a two-count Amended Complaint against Harris Trust and Savings Bank, Employees' Savings and Profit Sharing Plan of Bank of Montreal/Harris and Harris Benefits Administration Committee alleging violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq. Defendants now move to dismiss the Amended Complaint

pursuant to Fed.R.Civ.P. 12(b)(6). For the following reasons, the motion to dismiss is granted.

The plaintiff's well-pleaded allegations, which the court treats as true and views in a light most favorable to the plaintiffs for purposes of this motion, are as follows.

Defendant Harris Trust and Savings Bank ("Harris Bank") is an Illinois chartered corporation and the parent corporation of Harris Bank Winnetka. (Am.Compl.p 7). Defendant Employees' Savings and Profit Sharing Plan of Bank of Montreal/Harris ("Plan") is an employee profit sharing plan established by Harris Bank. (Am.Compl.p 8). Defendant Harris Benefits Administration Committee ("Committee") is a seven person committee of Harris Bank employees, which administers the Plan. (Am.Compl.p 9). Plaintiff Clair was a Senior Vice President of Harris Bank Winnetka from 1985 until 1994 and a participant in the Plan. (Am.Compl.p 3). Plaintiff O'Malley was Executive Vice President of Harris Bank Winnetka from 1975 to 1995 and also a participant in the Plan. (Am.Compl.p 5).

The Plan is maintained by Harris Bank to enable employees to accumulate funds and share in the contributions of their employer. (Am.Compl.p 10). The Plan's assets are invested in a diversified group of publicly traded securities. (Am.Compl.p 11). Section 9.3 of the Plan provides that payment of a terminating participant's benefits will be made within a reasonable time after his settlement date:

> Except as provided below in this subsection, payment of a participant's benefits will be made

> (or installment payments will commence) within a reasonable time after his settlement date, but not later than 60 days after (a) the end of the plan year in which his settlement date occurs, or (b) such later date on which the amount of the payment can be ascertained by the committee. (Am.Compl.p 12).

In May of 1995, Clair elected to terminate his interest in the Plan as of July 1, 1995. (Am.Compl.p 15). At that time, Clair inquired into what compensation he would be receiving on his funds from the termination date, July 1, 1995, until the actual payment date. Id. In a letter dated June 21, 1995, the "Profit Sharing Administrator" responded that "no earnings [would] be calculated on the account from July 1, 1995 until distribution." (Am.Compl.p 16). On or about August 15, 1995, approximately forty-five days after his termination date, Plaintiff Clair received his funds from the Plan. (Am.Compl.p 17). The funds he received did not include any interest or other compensation on his funds for any time after June 30, 1995 through on or about August 15, 1995. (Am.Compl.p 18).

Sometime in June or July, 1995, O'Malley also elected to withdraw from the Plan. (Am.Compl.p 20). On August 2, 1995, O'Malley requested that he receive the earnings that accrued on his funds from the time he elected distribution to the time the funds were actually paid. (Am.Compl.p 23). On or around August 15, 1995, O'Malley received his funds. (Am.Compl.p 21). O'Malley did not receive any interest or other compensation for any time after June 30, 1995 through August 15, 1995. (Am.Compl.p 22).

Appendix C

In a letter dated October 20, 1995, Defendant denied O'Malley's request for the earnings that accrued on his funds from the time he elected distribution to the time the funds were actually paid. (Am.Compl.p 24). As a result, O'Malley filed a petition for review of the denial of earnings. (Am.Compl.p 25). The Committee reviewed and denied O'Malley's request for earnings "pursuant to the provisions described concerning profit sharing plan withdrawals in the Benefits book." (Am.Compl.p 26).

Consequently, on June 6, 1997, plaintiffs filed the instant two-count Amended Complaint. Specifically, Count I alleged that defendants breached their fiduciary duty by failing to distribute benefits in a reasonable time and by retaining the interest, earnings, and other profits on the funds in violation of ERISA, 29 U.S.C. § 501(a)(3). (Am. Compl. pp 44 and 49). Alternatively, Count II alleged that defendants failed to distribute the full amount of benefits in violation of ERISA, 29 U.S.C. § 502(a)(1)(B). (Am.Compl.p 55).

Defendants moved to dismiss the Amended Complaint. On November 19, 1997, we granted defendants' motion to dismiss Counts I and II. Subsequently, plaintiffs filed a motion to reconsider. This court heard oral argument on plaintiffs' motion for reconsideration on December 4, 1997.

A motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) does not test whether the plaintiff will prevail on the merits but instead whether the claimant has properly stated a claim. See *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974), 416 U.S. 232, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). In deciding a motion to dismiss, the

court must assume all facts alleged in the complaint to be true, construe the allegations liberally and view the allegations in the light most favorable to the plaintiff. *Wilson v. Formigoni*, 42 F.3d 1060, 1062 (7th Cir.1994). Dismissal is properly granted if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Cushing v. City of Chicago*, 3 F.3d 1156, 1159 (7th Cir.1993) (quoting, *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 2233, 81 L.Ed.2d 59 (1984)). However, if the complaint fails to allege a necessary element required to obtain relief, dismissal is in order. *R.J.R. Servs., Inc. v. Aetna Cas. & Sur. Co.*, 895 F.2d 279, 281 (7th Cir.1989). In considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court is limited to the allegations contained in the pleadings. *Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir.1993). Documents attached to the pleadings, which are referred to in the plaintiff's complaint and are central to the claim, are considered part of the pleadings. Id.

Before turning to the merits of the motion before us, we must first address the preliminary issue of whether it is appropriate to rule on defendants' motion to dismiss before resolving the question of class certification. Generally, the issue of class certification should be resolved "[a]s soon as practicable," and thus, before any determination on the merits. Fed.R.Civ.P. 23(c); *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 947 (7th Cir.1989), aff'd in part and rev'd in part, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) (rev'd on other grounds); *Allen v. Aronson Furniture Co.*, 971 F.Supp. 1259, 1261 (N.D.Ill.1997). This directive does not apply, however, when the plaintiffs' claims are

without merit. Id. at 1261 (citing *Cowen v. Bank United*, 70 F.3d 937, 941 (7th Cir.1995)); see also *Marx v. Centran Corp.*, 747 F.2d 1536, 1552 (6th Cir.1984). Here, we do not believe that plaintiffs have standing to pursue their claims and, therefore, the more efficient course is to forego the class certification issue.

Defendants argue that plaintiffs' Amended Complaint should be dismissed in its entirety because Clair and O'Malley, who have both received the full value of their account balances as of their settlement date, cannot assert any entitlement to unpaid plan benefits, and as such, lack standing under ERISA. We agree.

Section 9.2 of the Plan, which is attached to plaintiffs' Amended Complaint, provides that "[d]istribution of the net credit balances in the participant's accounts as at his settlement date (after all adjustments required under the plan as of [his settlement] date have been made) will be made to or for the benefit of the participant. . . ." (Am. Compl., Ex. A at 35). Section 9.3 further provides that "payment of a participant's benefits will be made . . . within a reasonable time after his settlement date, but not later than 60 days after (a) the end of the plan year in which his settlement date occurs, or (b) such later date on which the amount of the payment can be ascertained by the committee." Id. at 37.

Upon review of these provisions, it is clear that the valuation of the participant's account will be made as of the participant's settlement date and that payment will be made within a reasonable amount of time thereafter. Here, it is undisputed that the defendants valued the plaintiffs' accounts

as of their settlement dates and made payment of the full value of their account balances within forty-five days. (Am. Compl. pp 16, 17, 20 and 21).

As former employees, however, plaintiffs Clair and O'Malley have a colorable claim to vested benefits if they seek benefits which "the employer promised to provide pursuant to the employment relationship and which a non-frivolous argument suggests have accrued to [their] benefit." *Panaras v. Liquid Carbonic Indus. Corp.*, 74 F.3d 786, 791 (7th Cir.1996). Plaintiffs do not, however, allege that defendants promised to provide interest, profits or other earnings accrued on their funds from the date of settlement to the date of distribution, nor do they cite any provision of the Plan which provides for interest, profits and other earnings accrued during the delay in actual payment of benefits.

Plaintiffs received in a lump sum the full value of their account balances as of their settlement dates. (Am. Compl. pp 17 and 21). Moreover, both parties agree that payment of their account balances was made within sixty days. (Am. Compl. pp 16, 17, 20 and 21). Because defendants paid plaintiffs within sixty days the full value of their accounts as of their settlement date, defendants acted in accordance with the Plan and provided plaintiffs with the full amount of benefits that they were contractually entitled to receive. Therefore, plaintiffs do not have a colorable claim to vested benefits and lack standing under ERISA.

Defendants' motion to dismiss Count I and Count II is accordingly granted.

Appendix C

For all of the foregoing reasons, Defendants' motion to dismiss Count I and Count II of plaintiffs' Amended Complaint is granted.

It is so ordered.

/s/ Wayne R. Anderson
United States District Judge

Date: April 27, 1998

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED SEPTEMBER 10, 1999

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 10, 1999

Before

Hon. Richard A. Posner, Chief Judge

Hon. Michael S. Kanne, Circuit Judge

Hon. Terence T. Evans, Circuit Judge

WILLIAM L. CLAIR and JOHN D. O'MALLEY, for themselves and for all others similarly situated,

Plaintiffs-Appellants,

v.

HARRIS TRUST AND SAVINGS BANK, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 96-C-7311
Wayne R. Andersen, *Judge*

Appendix D

ORDER

On August 24, 1999, plaintiffs-appellants filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges* has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED**.

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* Hon. Joel M. Flaum did not participate in the consideration of the petition.